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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

THE BOARD OF DIRECTORS OF THE CHICAGO THEOLOGICAL SEMINARY, *Plaintiff in Error,* vs. THE PEOPLE OF THE STATE OF ILLINOIS, ex relatione SAMUEL B. RAYMOND, County Treasurer and ex officio County Collector of Cook County, Illinois, *Defendant in Error.*	No. 140.
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REPLY FOR PLAINTIFF IN ERROR.

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REPLY FOR PLAINTIFF IN ERROR.

The two questions presented in the Brief for Defendant in Error are *First*, as to the jurisdiction of this court, and *Second*, as to the proper construction of the exemption provision in the charter of plaintiff in error.

I.

THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENTS OF THE STATE COURT.

The jurisdiction of the court is denied on two grounds:

First. That *one* of the grounds for the judgment of the state court is *res adjudicata*, and that this is not a federal question. (Brief, p. 8.)

Second. That the exemption provision in the revenue act of 1872, under which the taxes in question were levied, was identical, as to the exemptions provided for, with the revenue act of 1845, the act in force at the date of the charter, and that, therefore, the state court did not give effect to a *new rule* of exemption in sustaining the tax, and for that reason the court has no jurisdiction. (Brief, p. 13.)

1. The contention that one of the grounds for the judgment of the State Court is res adjudicata, and that this is not a federal question.

The ground of this contention is that, in the cases before the court, the decision in 174 Ill. was held by the State Supreme Court (as is claimed) to be a final judgment, and, therefore, *res adjudicata*.

As to No. 265, neither the judgment of the County Court, nor the judgment of the State Supreme Court, nor the opinion of the State Supreme Court in the case in 174 Ill., was in evidence, or was even mentioned in the record.

The sole question presented by the record, or passed upon by the state court in that case (No. 265), was the federal question, whether the subsequent revenue law of 1872, and the action of the state officers under it, in levying the tax,

impaired the obligation of the exemption provision in the charter of plaintiff in error.

It is true that the opinion of the State Supreme Court in the record (No. 265. Pr. Rec., 30) shows that while the court directly passed on the federal question, holding that the particular property was not within the exemption provision, and that, therefore, the tax was valid, it also cited its previous decisions in *People ex rel.* v. *Chicago Theological Seminary*, 174 Ill., 177, and in *Chicago Theological Seminary* v. *People*, 189 Ill., 439 (No. 140), and said that "those cases are decisive of this."

It is manifest, however, that these previous reported decisions were referred to, and could only be referred to by the court, as binding on it under the doctrine of *stare decisis*, and not as *res adjudicata*.

In fact, the entire argument of counsel on this point is based on passages from the opinion in No. 140, quoted at length in their brief, which had reference to the facts as to the opinion in 174 Ill., shown only in the record in No. 140.

It follows that in No. 265, even on the theory of counsel, the sole question presented is the federal question as to whether the subsequent act of 1872, and the action of the state officers under it, impaired the obligation of the contract in the charter of plaintiff in error, and that question is, therefore, admittedly before the court for determination in that case.

And whatever may be the decision on the question of jurisdiction in No. 140, the decision and judgment which this court shall render in No. 265 on the federal question, being the decision of the court of last resort, will be final and therefore binding on the state court in all subsequent proceedings.

The question, therefore, as to whether the previous opinion in 174 Ill., was held to be *res adjudicata* by the State Supreme Court as *one* of the grounds of its decision, and whether this should affect the jurisdiction of this court, only arises in case No. 140, and is only material as affecting the judgment in that case, which was for the particular taxes for the year 1899.

(1) As pointed out in our original brief, the only judgment rendered by the State Supreme Court in 174 Ill. (assuming that the opinion, which is the only evidence in the record, is a *judgment*), was that the judgment of the County Court, which was in favor of plaintiff in error, be "reversed and the cause remanded for further proceedings in accordance with the views herein (in the opinion) expressed." (174 Ill., 183.)

As the authorities cited show, and as counsel concede, this decision, treating it, for the purpose of the question, as a judgment, was not a *final* judgment, to review which plaintiff in error could sue out a writ of error to this court.

This is forcibly illustrated by the fact that the State, by its subsequent failure to redocket the case in the court below within the two years required by the Illinois statute, *abandoned the entire proceeding*, and there never has been, and never can be, any judgment for the particular taxes, the sole object of the proceeding against plaintiff in error. (Brief for Plff. in error, p. 43.)

The claim of counsel, therefore, comes to this; that the State Supreme Court, by holding that a former decision by it, in a case in which there was no final judgment reviewable in this court, was binding on *it* as *res adjudicata*, in the cases before the court, has deprived this court of jurisdiction to review its decision of the federal question which

it is admitted is presented to this court for decision for the first time in the cases now before it.

If, by the action of the State in not further prosecuting the proceeding in 174 Ill., whereby, by force of the statutory provision, *it was abandoned and at an end*, the decision in 174 Ill. is now final and binding on this court, it would always be in the power of the state court to defeat the jurisdiction of this court to review its decision of a federal question, in any subsequent case which might involve the same question, by remanding the first case for further proceedings in conformity with the opinion.

(2) It is said, however, by counsel, that in the case in 174 Ill., "neither in the County Court, nor in the Supreme Court was it ever intimated that any federal question was involved. Such a question was not raised by the parties and, therefore, under no circumstances could that case have ever been brought to this court for review." (Brief, p. 8.)

While the record in the case in 174 Ill., was not in evidence in No. 140, and for that reason is not before the court, enough appears in the facts stipulated to show that the precise federal question, which is admittedly involved in the two cases before the court, was in fact directly involved and therefore directly passed on by the state court in that case.

The theory of counsel seems to be that, because it does not affirmatively appear that in the case in 174 Ill. the plaintiff in error *expressly set up and claimed* the benefit of the federal Constitution, and the State Supreme Court placed its decision sustaining the tax against the particular property *on the construction of the charter*, therefore there was no federal question, and for that reason the case could not have been brought to this court for review.

While we do not concede that the claim was not in fact expressly set up in the case, it is a sufficient answer to counsel that it was not necessary that this should appear in order to give this court jurisdiction to review the case.

It is settled by numerous decisions of this court that in the cases which arise under the second clause of the provision (Rev. Stat., Sec. 709) which defines the jurisdiction of this court to review the judgments of state courts—cases in which is drawn in question the validity of a statute of a state on the ground that it is repugnant to the Constitution of the United States—this court has jurisdiction if the facts in the record show that the validity of a state statute under the constitution of the United States was necessarily drawn in question and the decision of the state court was in favor of its validity, and that it is not necessary that the federal question be set up or claimed.

Yazoo & Mississippi V. Ry. Co. v. *Adams*, 180 U. S. 14, and cases cited.

Columbia Water Pipe Co. v. *Columbia Electric Ry. Co.*, 172 U. S., 475, 488.

And the fact that the State Supreme Court did not expressly refer to the contract clause of the constitution, does not prevent this court taking jurisdiction, if the application of such clause was necessarily involved in the decision.

Id.

It appears from the very opinion of the state court relied on (174 Ill., 177), that the particular judgment of the County Court was for the taxes for the year 1896; that in defense the plaintiff in error set up and relied on its charter, and that the state officers in levying the tax, and the court in rendering the judgment, acted under the sup-

posed authority and in enforcement of the subsequent law of 1872. (See, also, No. 140, Pr. Rec., 41–43.)

It thus appears that the federal question was in fact involved in the case in 174 Ill., and that the Supreme Court of Illinois in its decision in effect passed on that question, and that, therefore, if there had been a *final judgment* in the case this court would have had jurisdiction to review the decision.

See, also, brief for plaintiff in error (pp. 37-38), and cases cited.

(3.) As stated in our original brief (pp. 41–46), two grounds of defense were set up by the objections filed in No. 140, presenting these two questions:

First: The federal question, whether the subsequent law under which the taxes for which judgment was asked were levied impaired the obligation of the charter of plaintiff in error, which involved the question of the construction of the charter provision.

Second: The question whether *the former judgments in the County Court* in favor of plaintiff in error were *res adjudicata* of the question of construction.

It will be seen that even if the state court decided the *second* question, which arose on the affirmative defense of the former judgments of the County Court, against plaintiff in error, the *first* —the federal question—would still remain and must be decided in favor of the defendant in error before it would be entitled to judgment for the taxes.

There is no dispute that the State Supreme Court in its opinion in No. 140 directly considered and passed on this federal question. (No. 140, Pr. Rec., 54.)

The contention, however, is that in No. 140 the Supreme

Court also put its decision giving judgment in favor of the state on the ground that its former decision in 174 Ill., 177, as shown in the opinion referred to in the record, was *res adjudicata* of the question of construction of the charter provision.

Counsel say: "*One of* the grounds of the judgment of the state court is *res adjudicata* and *this is not a Federal question.*" (Brief, 8.)

As appears from the very cases cited by counsel to sustain this contention, it must be shown from the record that the independent ground of decision, which it is claimed did not involve a federal question, was broad enough *of itself* to sustain the judgment of the State Court, and, *also*, either that it was made by the State Court one of the *express* grounds of its decision sustaining the judgment, or that it was a good and valid one.

Klinger v. *Missouri*, 13 Wall., 257 at 263.
Bacon v. *Texas*, 163 U. S., at 227.
Rutland R. R. Co. v. *Central Vermont R. R. Co.*, 159 U. S., 630.
Beaupre v. *Noyes*, 138 U. S., 397.

In the first place we contend that the language quoted by counsel from the opinion in No. 140, and on which they base this contention, was used in that part of the opinion in which the court considered and passed on the *affirmative* defense made by plaintiff in error that *the former judgments of the County Court in its favor* were *res adjudicata* of the question, and after it had disposed of and decided the federal question adversely to plaintiff in error.

The precise point on which the court was passing in the part of the opinion quoted from by counsel, and which

followed this express ruling on the federal question, is thus stated in the opinion (No. 140, Pr. Rec., 54):

"*Second.* It appears that in each year for a number of years prior to 1897 appellant objected to the entry of judgment for general taxes in the County Court against certain of its lands, upon the alleged ground that said lands were exempt from taxation. * * * The contention now made in the present case is *that the judgments so rendered by the County Court in these former years in its favor* sustaining the objections so made by it are in the nature of estoppels, and constitute a *res judicata against the prosecution of the present proceeding.*"

Following this the opinion proceeds to consider the particular objection (see No. 140, Pr. Rec., 55 to 62) and holds on different grounds that it should not be sustained.

The third ground of its conclusion that the *former judgments of the County Court* were not *res adjudicata* in favor of plaintiff in error is thus stated: "But we are *inclined* to hold that under the circumstances above detailed the *last* judgment, which is the judgment rendered by this court, is the *controlling* one. * * * Inasmuch as appellant did not set up such former recoveries as a defence (in 174 Ill.) the adjudication made against it by this court *is a bar to its right to claim under such former judgments as estoppels.*" (Pr. Rec., 57)

It was in the course of its reasoning (No. 140, Pr. Rec. 61–62) in support of this particular ground of its decision, on the question whether the former judgments *in favor of plaintiff in error* were *res adjudicata* and therefore a valid defense, that the court used the language quoted by counsel.

Following its reasoning in support of this ground of its decision of the particular question, the court states its conclusion thus (No 140, Pr. Rec., 62):

"Our *conclusion* upon *this branch of the case* (the objection that the former judgments of the County Court in favor of plaintiff in error were *res adjudicata*) is that the judgment of reversal rendered by this court operated as a bar and complete defense *against the previous judgments rendered by the County Court and relied upon by the appellants herein.*"

It thus appears from the opinion of the state court that it was not *one* of the grounds of its decision—that the state was entitled to judgment nothwithstanding the exemption provision—that the decision in 174 Ill., was *res adjudicata* of the question of construction, but that the language quoted by counsel was only used in the course of the reasoning of the court in that part of the opinion which had reference solely to the particular *affirmative* defense, *that the former judgments of the County Court were res adjudicata in favor of plaintiff in error.*

This construction of the opinion is confirmed by the certificate of the Chief Justice of the State Supreme Court. (No. 140, Pr. Rec. 67.)

(4) If, however, it is assumed that in the language quoted the state court intended to hold, as stated by counsel, that the decision in 174 Ill. was *res adjudicata* on the question of "the construction of the exemption clause of the charter," counsel is in error in the contention that this establishes that the State Supreme Court in so doing *based its decision on a ground that did not involve the decision of the federal question.*

We have already seen, and it is conceded by counsel, that where it is sought to levy a tax under a subsequent law on property exempted by a charter provision, a ruling of the state court giving judgment in favor of the state is necessarily a decision of the federal question, *notwithstand-*

ing it places its decision wholly on the ground that under its construction of the contract the particular property was not exempt from taxation.

It being well settled that a decision that the property was not exempt under the charter provision is a decision of the federal question, the only effect of counsel's contention is that the court in its opinion placed its decision of the federal question on two grounds, *first*, on the ground that the decision in 174 Ill. was binding on it as a former decision of the question of construction under the rule of *stare decisis*, and *second*, on the ground that the judgment in 174 Ill. was *res adjudicata* of the question.

This federal question is now before this court in another case, (No. 140) and its jurisdiction to determine it admittedly is not affected by the fact that the state court put its decision of the question on the particular ground of the construction of the charter, the determination of which was involved, as this court holds, in the decision of the federal question.

This being so, whether the state court based its decision of the question of construction on the ground that its former ruling in 174 Ill. was binding on it as *stare decisis*, or on the ground that the decision in that case was *res adjudicata*, or both, the question must be determined in this court as an original question wholly irrespective of the grounds or reasons of the state court's decision.

That the former decision of the question of construction by the State Supreme Court in 174 Ill. is not binding on this court under the doctrine of *stare decisis* is conceded by counsel.

The question, therefore, is whether the former judg-

ment of the State Supreme Court in 174 Ill. is binding on this court as *res adjudicata*.

It is submitted that this is not a question as to the jurisdiction of the court, but as to the effect to be given by this court *in the exercise of its jurisdiction* to this prior decision of the state court.

This is in effect recognized by counsel in their contention that this court, in deciding the question of construction, is bound by the ruling of the state court in its opinion in No. 140 (as claimed by counsel) that the former decision in 174 Ill. is *res adjudicata*. (Brief, pp. 19–20.)

The question as to the binding effect of this decision of the state court will therefore be considered by us in that part of this reply in which we discuss the question of construction. (See *infra*, Point II.)

(5.) The only *facts* as to the case in 174 Ill. shown in the record in No. 140, were that the court in that case "filed the opinion," "as set forth *in* 174 *Ill.*, at p. 177," and *the date* it was filed, and that at the time of the trial, which was more than two years after the filing of the opinion, the case had not been redocketed in the trial court and had therefore been *abandoned*. The *judgment*, if any, entered by the State Supreme Court in pursuance of its *opinion*, *was not given in evidence or otherwise referred to in the record* as would have been necessary even to present the claim that the former *judgment* in the case was *res adjudicata* as to the question.

That the *opinion* of a court of review is not itself a final judgment, and that the fact that there was a final judgment cannot be shown from an examination of the *opinion*, but that this must appear from the *judgment*

actually entered, was expressly held by the Supreme Court of Illinois in the following cases:

Anderson v. *Fruitt*, 108 Ill., 378.
Harzfeld v. *Converse*, 105 Ill., 534.

In the above cases, the court, in holding that there was no *final* judgment of the Appellate Court of the State, expressly held that it could not look into the *opinion* of the court for the purpose of determining whether there was a final judgment, but that this must be determined from the judgment or order actually entered.

'So, also, neither the verdict of a jury nor the finding of a court, not followed by a final judgment based on the verdict or finding, is *res adjudicata*.

Springer v. *Bien*, 128 N. Y., 99.

So, even an order directing a final judgment, but on which no final judgment has been entered, is not *res adjudicata*.

Bouldin v. *Phelps*, 30 Fed. R., 548, 578.

(6) This court has expressly held in two cases that the decision of a State Supreme Court in which it passes on questions in the case, but reverses and remands it without directing that a particular judgment be entered, is not *res adjudicata*, on the questions passed on in the opinion, in another suit in the Federal court on the same cause of action.

Gardner v. *M. C. R. R. Co.*, 150 U. S., 349.
Bucher v. *Cheshire R. R. Co.*, 125 U. S., 555, 578.

See, also, to the same effect,

Union Bank of Richmond, Va., v. *Board of Commrs. of Oxford*, 90 Fed. R., 70.
Hooper v. *Atlanta, K. & N. Ry. Co.*, 65 S. W. Rep. (Tenn.), 405.

In *Bucher* v. *Cheshire R. R. Co., supra*, the plaintiff recovered judgment in the state court, and the highest appellate court of the state, reviewing the case, decided the points of law involved in it, set aside the judgment and sent the case back for a new trial. The plaintiff thereupon took a nonsuit and brought a new suit in the Circuit Court of the United States on the same cause of action.

This court held that the opinion of the State Supreme Court was not *res adjudicata* on the questions of law.

On this point, the court, MILLER, J. delivering the opinion, said, p. 578:

"It (the decision of the State Supreme Court) is not a matter of estoppel which bound the parties in the court below, because there was *no judgment entered in the case in which the ruling of the state court was made*, and we do not place the correctness of the determination of the Circuit Court in refusing to permit this question to go to the jury on the ground that it was a point decided between the parties, and, therefore, *res adjudicata* as between them in the present action."

In *Gardner* v. *M. C. R. R. Co., supra*, the above case was followed and the above language quoted with approval.

In fact the Supreme Court of Illinois has expressly held in different cases—none of which are referred to as overruled or modified by it in its opinion in No. 140—that a decision of a court of review remanding a case for further proceedings in conformity with the opinion is not a *final* judgment.

Such was the express ruling of the State Supreme Court in *City of Paxton* v. *Bogardus*, 188 Ill., 72, in which a judgment of the trial court, confirming a special assessment, was reversed and remanded by the State Supreme Court, " for further proceedings *in accordance with the*

views expressed in the opinion filed in this cause," (the precise language of the opinion in 174 Ill.).

The court say:

"The petitioner was entitled to *another* trial after its former judgment was reversed by this court and the cause remanded for further proceedings. While such further proceedings must be in accordance with the principles announced in the opinion filed on the former appeal, still, *as the former judgment was annulled and set aside and the cause was remanded for further proceedings, the petitioner is entitled to another trial before a final judgment can be rendered against it.* No directions were given by this court *to dismiss the petition* . . *to enter judgment of any kind* against the petitioner, but only for *further proceedings* conforming to the legal principles stated in the opinion. Such further proceedings in such a case *implied another trial.*"

In *Grant* v. *Bennett*, 96 Ill., 513, it was held that even a decision of the State Supreme Court, settling the rights of the parties, but reversing and remanding the case, with directions as to the decree to be entered (*Rockafellow* v. *Newcomb*, 57 Ill., 186), was not a *final* judgment, so as to become a lien or divest title.

The same court has also held that a decision by the State Appellate Court reversing and remanding a case for further proceedings in conformity with the opinion, although binding on the Appellate Court, on a second appeal (*Middeke* v. *Balder*, 98 Ill. App., 525), is not binding on the Supreme Court on such appeal *for the reason that it is not a final judgment.*

Board of Trade v. *Nelson*, 162 Ill., 431, 437.
Linnington v. *Strong*, 111 Ill., 152, 159.

In *Board of Trade* v. *Nelson*, *supra*, which was a proceeding for mandamus, the court say (p. 437):

"The judgment of the Appellate Court on that appeal merely reversed the judgment of the Superior Court and remanded the cause to that court for further proceedings *not inconsistent with the opinion of the Appellate Court. This direction was no more than the law requires of the trial court in every case. There was no order to do any specific thing. Such a judgment is not final*, and does not conclude the parties in this court. No appeal could be taken from the former judgment."

The ruling of the State Supreme Court so far as it sustains the view that the judgment in 174 Ill. was final, was based wholly on the supposed authority of previous cases decided by it which are cited in the opinion.

An examination of the prior cases cited in the opinion will show that they were all cases in which the effect of a previous decision, reversing and remanding the case for proceedings in conformity with the opinion, *arose on a second appeal in the same case*, and the court held that, as to the points of law decided in the previous opinion, the former decision was final and binding on the court.

As this court pointed out in the case of *Great Western Telegraph Co.* v. *Burnham*, 162 U. S., 339, there is a clear distinction between cases in which the effect of such a decision on a subsequent appeal of *the same case* is involved and cases in which the question is presented as to whether it is a *final* judgment.

A reference to the decisions of the very court, the Supreme Court of Illinois, shows that its decisions, holding that a former decision reversing and remanding a case is binding on a second appeal as to the particular question decided in the previous opinion, are not based on the ground that the previous decision was a *final* judgment, but on wholly different grounds.

Thus in *Smythe* v. *Neff*, 123 Ill., 314, the court holds such a decision binding under the doctrine of *stare decisis*.

(7) Counsel say (Brief, 13):

"If plaintiff in error had considered that the decision in 174 Ill. was not a *final* adjudication of the questions involved, there is no reason why it could not have filed the mandate of reversal and obtained a judgment in the County Court in conformity with the mandate and then have brought *that judgment* to this court *for the review* of any alleged federal question."

The claim here made is, in effect, that it was incumbent on the defendant against whose property judgment was sought, not only to redocket the case, but *to apply to the court* to render a judgment in favor of the state *and against itself*.

The sole object of the proceeding was to obtain a judgment for the particular taxes against the property of plaintiff in error.

Suppose that the plaintiff in error had redocketed the case. It was not the moving party and it had no right, much less was it incumbent on it to apply to the court to render judgment in favor of the state and *against itself*, which would become a lien on its property.

The plaintiff in error could not conduct the proceedings *for the state*, and if the state did not choose to itself prosecute the case (and its failure to file the mandate shows it did not intend to) it had a right to dismiss the proceeding by taking a non-suit.

The proceedings being at law, under the decision of the Supreme Court remanding the case to the trial court for further proceedings, a new trial was necessary.

See *City of Paxton* v. *Bogardus*, 188 Ill., 72, and other cases cited, *supra*.

Under the well settled law of Illinois the state had a right to take a nonsuit at any time before the trial, and it would have been error for the court to proceed to trial after a motion for a nonsuit.

Gordon v. *Goodell*, 34 Ill., 429.
Howe v. *Harroun*, 17 Ill., 494.
Adams v. *Shepard*, 24 Ill., 464.
Stanton v. *Kinsey*, 151 Ill., 301.

And where the plaintiff fails to prosecute his suit, the defendant is not entitled to demand a trial and judgment, but his only right is to have the suit dismissed at the plaintiff's costs, for want of prosecution, as in case of nonsuit.

Buena Vista Freestone Co. v. *Parrish*, 34 W. Va., 652, and authorities cited.
Felts v. *Delaware & Lackawanna R. R. Co.*, 170 Pa. St., 432.
Glaspie v. *Keator*, 44 Minn., 448.
Delano v. *Bennett*, 61 Ill., 83, at 85.

And the fact that the opinion of the Supreme Court remanding the case, would be binding in subsequent proceedings in the same case, as to the question of law decided by it, did not deprive the State, in whose favor the decision was made, of its right to take a nonsuit.

Hooper v. *Atlanta K. & N. Ry. Co.*, 65 So. W. R., 465.
Gordon v. *Goodell*, 34 Ill., 429.

In fact, the failure of the state to file the mandate within the two years required by the statute, thereby abandoning the proceeding, was in legal effect the same as a nonsuit, which is regarded in law as "an *abandonment* of the suit."

Holmes v. *C. & A. R. R. Co.*, 94 Ill., 439.
6 Enc. Pl. & Pr., p. 908.

Such a judgment of nonsuit would not be *res adjudicata*, or a bar to a new suit.

Homer v. *Brown*, 16 How., 354.
Manhattan Life Ins. Co. v. *Broughton*, 109 U. S., 121, at 124.
McCloskey v. *McCormick*, 44 Ill., 336.
Rudolph v. *German Mutual Fire Ins. Co.*, 71 Ill., 190.
L. E. & W. Ry. Co. v. *Sellman*, 51 Ill. App., 617.

In fact, even if plaintiff in error could have "*obtained* a judgment in the County Court in conformity with the mandate" "*that* judgment" could not have been taken to this court for review, as counsel erroneously assume.

Such was the express decision of this court in *Great Western Telegraph Co.* v. *Burnham*, 162 U. S., 339. As decided in that case, the only remedy, in case of such a judgment by the trial court, is to appeal from that judgment to the State Supreme Court, and, in the event of an affirmance by that court of the judgment, to sue out a writ of error to this court to review the judgment of the Supreme Court.

The very fact that, as was held in the same case, on the appeal from the second judgment of the County Court in conformity with the mandate, the State Supreme Court would have been bound by its former decision in the case, and that this court would not be, further illustrates the fact that the decision in 174 Ill. was not a final adjudication in the sense of a former judgment binding on this court.

2. The contention that the revenue act in force at the date of the charter was the same as the revenue act adopted after the date of the charter and under which the taxes in question were levied, and that therefore this court has no jurisdiction.

It is not controverted by counsel, but in effect conceded that, as this court has many times held, where taxes are levied on property claimed to be within the exemption provision of a charter, under the supposed authority of a subsequent act of the legislature, a federal question is necessarily involved, and this court therefore has jurisdiction, *notwithstanding the State Supreme Court based its decision wholly on the ground that under its construction of the exemption provision the particular property was not exempt from taxation.*

(See cases cited in brief for plaintiff in error, page 38.)

This being the well-settled law, the contention of counsel cannot be sustained.

(1) It is not claimed by counsel that the previous revenue act, that of 1845, was in the same language as the subsequent act of 1872, under which the taxes were levied. On the contrary, the exemption provisions of the two laws are in wholly different language. (See brief for defendant in error, p. 15.) The claim, however, is that the exemption provision of the previous law *as construed by the State Supreme Court* was the same *in effect* as that of the act of 1872. (Brief, p. 16.)

The contention, therefore, is that somehow, if it can be shown that the revenue act in force at the date of the charter, although wholly different in language, *is the same in effect* as the subsequent law under which the taxes are levied and enforced, this court is thereby deprived of the jurisdiction which it would otherwise have to review the decision of the State Supreme Court.

In fact the prior revenue act of 1845, quoted by counsel, was not only different in language but also different in substance from the subsequent act of 1872. One of the exemptions contained in the provisions which followed the language quoted by counsel, "subject to the exemptions *hereinafter stated*," was the following (Rev. Stats. of Ill., 1845, p. 437):

"All property which is, or may be exempt from taxation *by special law*."

When, therefore, the charter of plaintiff in error was adopted, this property became exempt to the extent of the exemption provision in the charter by the terms, not only of the charter itself, but of the general revenue act in force at the time.

In the subsequent revenue act of 1872 (brief for plaintiff in error, p. 8), no exception whatever was made, as in the former act, of property, "exempt from taxation *by special law*," but it was provided in express terms that "*all real and personal property* in this state," "except so much thereof as may be *in this act* exempted," "*shall* be assessed and taxed."

And it was under the supposed authority of this act, which in its terms covered the property in question, that the particular taxes in question were levied by the state officers, and the judgments of the state court were rendered.

(2) The precise question as to taxes levied under the same revenue act of 1872 on property claimed to be exempt under a charter provision passed at the same session of the legislature as that of plaintiff in error (the session of 1855) arose, and was decided adversely to the contention of defendant in error in *University* v. *People*, 99 U. S., 390.

It appears from the full report of the briefs of counsel for

the state in that case (the defendant in error in the cases before the court) that the following contentions were made (see pp. 315–317).

"The revenue law passed in 1872 is a *mere revision of* that of 1853, and makes *no substantial changes* therein so far as respects the question of the exemption of property from taxation. (Quoting the statutory provisions.)

Cases cited by counsel for plaintiff in error, where there was an actual attempt by subsequent legislation, or the adoption of a new constitution, to amend or repeal former special charters, are inapplicable to the cases presented by this record. * * *

In this case it neither appears from the record, nor otherwise, that the decision of the state court was based upon, or in any manner affected by, any law of the state passed subsequently to the making of the supposed contract, or that any such claim was ever made in that court by counsel on either side."

The court, referring to these contentions (Mr. Justice MILLER, delivering the opinion) says (pp. 319–320):

"The argument is that the judgment of the state court is *limited to a construction of* the fourth clause of the amendatory charter of 1855 (the exemption provision), as it is affected by the constitution under which it was enacted, and that whether that statute was a contract or not, or *whether it was properly construed or not*, it is still but the decision of a court *construing a contract or a statute*, and there is *no law* of the state impairing the obligation of that contract, within the meaning of the constitution of the United States."

The court, after referring to the general revenue act in force prior to the charter and quoting the provisions of the constitution of 1870, and of the revenue act of 1872, (quoted in our brief, p. 8), says (p. 320):

"It was under this law the local officers proceeded in assessing plaintiff's land for taxation, and it was *their construction of the law* which was sustained by the Supreme Court. If, therefore, the legislation of 1855 was a contract which exempted the property in question from taxation, and *by the law of* 1872, *as construed by the Supreme Court*, it is held

liable to taxation, it is manifest that it is the *law of* 1872 and the constitution of 1870 which impairs the obligation of that contract, however the court, *by an erroneous construction of that contract*, may be led to hold otherwise. * * * But if it (the charter provision) is a contract, as is contended for by plaintiff's counsel, which, under a true construction of the constitution of 1848, exempts all the property of plaintiff which is held by it for appropriation to the purposes of the University as a school, as an institution for teaching, and which is held for no other purpose whatever, * * * *then the law of* 1872 *and the constitution of* 1870 do, to the extent of the difference arising from these two constructions, impair the obligation of the contract of 1855. Whether that contract is such as to be impaired by these later laws is one of the questions of which this court always has jurisdiction."

In *Yazoo R. R. Co.* v. *Thomas*, 132 U. S., 174, the same question arose and the same ruling was made by this court.

The court, Mr. Chief Justice FULLER delivering the opinion, says:

"The taxes in question were assessed under the act of 1888, and, if the charter of the company, which became a law on the 17th of February, 1882, inhibited such taxation, then this court has jurisdiction to re-examine the conclusion reached. * * * The result is the same, *although the act of* 1888 *be regarded as simply putting in force revenue laws existing at the date of the company's charter*, rather than itself imposing taxes, for, if the contract existed those laws became inoperative, and would be reinstated by the act of 1888. The motion to dismiss the writ of error is, therefore, overruled."

See, also,

Asylum v. *New Orleans*, 105 U. S., 362.

(3) The entire contention of counsel is based on an erroneous view of *St. Paul, Minneapolis and Manitoba Railroad Co.* v. *Todd County*, 142 U. S., 282, which is quoted at length.

As to this case, it will be noted, in the first place, that the court nowhere expresses the intention to overrule or modify, and does not even refer to either of the two cases cited, *supra*, in which, as we have seen, the precise point now made was passed on, (*University* v. *People*, 99 U. S., 309, and *Yazoo R. R. Co.* v. *Thomas*, 132 U. S., 174), although the opinion was delivered by Mr. Chief Justice FULLER, who also delivered the opinion in *Yazoo R. R. Co.* v. *Thomas*.

That there was in fact no intention to overrule those cases, or to change the ruling made by them, also clearly appears from facts of the case.

In that case the charter of the railroad company, passed in 1857, provided for an annual payment of 3 per cent. of the gross earnings of the company, "in lieu of all taxes and assessments whatever," and that in consideration of such payments "the said company shall be forever exempted from all assessments and taxes whatever." The revenue act in force at the date of the levy of the taxes provided "that *railroad, insurance and telegraph companies* shall be taxed in such manner as *now is* or may hereafter be fixed by law." The only law providing for the taxation of the property of railroad companies was the revenue act passed in 1855 and in force *at the date of the charter*. The constitution of 1857 (the year in which the charter was adopted) expressly provided that "*all* laws now in force (including the acts referred to) *shall remain in force.*"

It thus appears that the taxes in question in the particular case were levied under an act *in force at and prior to the date of the charter and not under any subsequent act of the legislature*. Under these facts this court held that it was without jurisdiction.

That such was the effect of the decision in *St. Paul, Minneapolis & Manitoba R. R. Co.* v. *Todd County*, was expressly held in the subsequent case of *Wilmington & Weldon Railroad Co.* v. *Alsbrook*, 146 U. S., 279.

In that case it was claimed that certain property was exempt from taxation under the charter of the railroad company, and that for that reason a tax levied under the authority of a subsequent law of the state was invalid as impairing the obligation of the contract. It was contended by counsel for defendant in error, among other things, that "the decision of the state court is based on the *construction of the contract itself*. It concedes its validity but denies that a certain class of property is within its terms. Hence the writ of error should be dismissed. *St. Paul, Minneapolis, etc., Railway* v. *Todd County*, 142 U. S., 282."

The court, Mr. Chief Justice FULLER, who also wrote the opinion in *St. Paul, Minneapolis, etc. Ry. Co.* v. *Todd County*, delivering the opinion, says:

"The jurisdiction of this court is questioned upon the ground that the decision of the Supreme Court of North Carolina *conceded the validity of the contract of exemption* contained in the act of 1834, but *denied that particular property was embraced by its terms;* and that, therefore, such decision did not involve a Federal question.

In arriving at its conclusions, however, the state court *gave effect to the revenue law of* 1891, and held that the contract did not confer the right of exemption *from its operation*. If it did, its obligation was impaired *by the subsequent law*, and as the inquiry whether it did or not was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed.

We do not regard * * * *St. Paul, Minneapo etc., Railway Co.* v. *Todd County*, 142 U. S., 282, cited by defendant in error, *as qualifying the rule upon this subject.* * * *

In *St. Paul, Minneapolis, etc., Railway Co.* v. *Todd County*, certain lands were considered by the State Court as not within the exemption claimed *under the revenue law existing at its date.*

But in the case at hand the court passed upon the action of the authorities *in virtue of a legislative act approved more than fifty years after the making of the supposed contract, and explicity upheld the law.*"

See, also, the following later cases to the same effect.

McCullough v. *Virginia*, 172 U. S., 102, 117.

Water Power Co. v. *Street Ry. Co.*, 172 U. S., 475, 487.

Houston & Texas Central R. R. Co. v. *Texas*, 177 U. S., 66, 77.

II.

THE PROVISION OF THE CHARTER OF PLAINTIFF IN ERROR EXEMPTED FROM TAXATION THE PROPERTY IN QUESTION, AND, FOR THAT REASON, THE LAW UNDER WHICH THE TAXES WERE LEVIED IMPAIRED THE OBLIGATION OF THE CONTRACT AND THE JUDGMENT SHOULD, THEREFORE, BE REVERSED.

Two contentions are made by counsel: (1) that the decision of the State Supreme Court in 174 Ill. is *res adjudicata* on the question of the construction of the charter provision, and binding on this court as such, and (2) that if the decision in 174 Ill. is not *res adjudicata*, the property in question is not within the exemption provision.

1. The decision of the State Supreme Court in 174 Ill. is not binding on this court as res adjudicata on the question of construction.

On page 19 of their brief, counsel contend that the decision of the Supreme Court of Illinois in 174 Ill., 177, giving a con-

struction to the charter provision, is *res adjudicata* of the question in this court.

As we have seen, neither the judgment nor the opinion in 174 Ill. is in evidence, or anywhere mentioned, in the record in No. 265, except that the court in its opinion refers to the reported decision. In any view, therefore, the contention can only apply to No. 140.

As to No. 140:

(1.) As we have also already shown, the *judgment* of the State Supreme Court in 174 Ill. is not in evidence. The only facts shown in the record in the case (No. 140) are the stipulation that the *opinion* reported in 174 Ill. was filed, and that no mandate to the trial court was ever issued by the Supreme Court (No. 140, Pr. Rec. 43). That such an *opinion* is not a final judgment, but that the fact that the judgment of the court was a *final* judgment, must appear from the judgment actually entered, and cannot be shown by the *opinion*, see the cases decided by the Supreme Court of Illinois and the other cases cited, *supra*.

(2) It is argued by counsel that the judgment of the State Supreme Court in 174 Ill. is a final judgment, on the ground that the State Supreme Court so held in No. 140, and that in so deciding the State Supreme Court decided "as to the meaning of the state practice act," and for that reason its decision should be conclusive.

But, as we have seen, the decision of the federal question by this court, in the exercise of its appellate and revisory jurisdiction, involves the decision by it of the question as to proper construction of the exemption provision.

And the question, whether the former decision of the state court in 174 Ill., as to the proper construction of the

provision, is binding on this court as *res adjudicata*, is a question not of local law, but of general law.

It follows that the question, whether the decision in 174 Ill. is *res adjudicata* as to the proper construction of the charter provision, is a question which this court will determine for itself as a question of general law, and irrespective of the opinion of the State Supreme Court, except as the grounds and reasons of that opinion may commend themselves to the court.

(3) Even in the view contended for by counsel, that the judgment in 174 Ill. is before the court as part of the record, this judgment is not *res adjudicata* and therefore binding on this court as a decision of the federal question, for different reasons.

First. It is fundamental that a former judgment to be *res adjudicata* in another proceeding must be a *final* judgment. The only judgment in 174 Ill., was a judgment reversing the former judgment, and remanding the case to the lower court for a new trial in accordance with the opinion. The fact that the State Supreme Court in the opinion reversing the former judgment decided a question of law which might be controlling on the new trial, and that on such new trial that decision would be binding on the trial court as to the particular question decided, did not make this judgment a *final* judgment.

That it was not a *final* judgment entitling the appellant to sue out a writ of error to this court is clear.

For the same and in fact stronger reasons it is clear that such a judgment of reversal and remand for a new trial in a case at law, whatever the views expressed on the questions of law which might arise, and whatever the effect to be given the opinion in a subsequent trial in the same case,

would not be pleadable as a former judgment in another suit or proceeding.

See authorities cited, *supra*.

It is submitted that there is neither reason nor authority in support of the position that the decision of an appellate court reversing and remanding a cause for a new trial in conformity with the opinion, however material the questions of law decided in the opinion may be on the new trial, is a final judgment pleadable as *res adjudicata* in another case.

And that such is not the law is shown by the express decisions of this and other courts cited *supra*.

Second. In addition to the fact that the judgment of the State Supreme Court only reversed and remanded the case for a new trial, in conformity with the views expressed in the opinion, the record shows that the state, the moving party in the proceeding, took no further steps in the case, either to file a remanding order or re-docket the case, and that by reason of its failure to do this for two years, under the express provision of the statute of the state, *the entire proceeding was abandoned.*

As a result of this action of the state, there was not only no final judgment in the case but the entire suit was completely at an end, as if the state, the case having been re-docketed, had taken a voluntary non-suit. The mere fact that, as the State Supreme Court has held, the effect of such abandonment of the particular proceeding was to leave the state free to commence a new proceeding (*Koon* v. *Nichols*, 85 Ill., 155) shows conclusively that the particular proceeding *was at an end.*

In fact the State Supreme Court in its opinion in the very case (No. 140, Pr. Rec., 62) held that the effect of the failuer

of the state to file the mandate and redocket the case was that "the *particular* suit shall be considered as *abandoned* and *no further action* shall be had therein."

It would be indeed an anomaly in law to hold that the judgment of reversal granting a new trial, in a proceeding which subsequently was terminated by the voluntary action of the moving party, was a final judgment, and *res adjudicata* in another proceeding.

That such is not the law see cases cited *supra*.

Third. A final and conclusive reason against treating the proceeding as *res adjudicata* in this court is that, because the judgment of the State Supreme Court was not final, the plaintiff in error had no right to a writ of error to bring the case to this court, the court of last resort, to have the decision of the federal question in the opinion reviewed.

Nor was there any subsequent judgment in the case which gave it any right to such review in this court, but on the contrary, the state subsequently wholly abandoned the proceeding, and it was thereby so completely at an end that there was not only no judgment, but no possibility of a judgment which would entitle the plaintiff in error to have the decision reviewed in this court.

The claim, therefore, that the decision of the State Supreme Court in 174 Ill. is *res adjudicata* of the federal question in No. 140, is in effect the manifestly untenable one that the *decision* of a federal question by a state court, which resulted in no final judgment reviewable here, is binding on this court as *res adjudicata* of the federal question, in another suit in which there was a final judgment and in which this court therefore has jurisdiction for the first time to review the decision of the state court.

See, also, *supra*, and the authorities there cited.

2. The construction given by counsel to the exemption provision is erroneous.

The question of construction depends on the meaning to be given to the word "seminary" in the exemption provision.

The view adopted by the State Supreme Court as to the meaning of this word in the provision, is wholly abandoned by counsel for defendant in error, and a meaning wholly different from, and, in fact, inconsistent with that meaning is attempted to be given it.

The State Supreme Court say (174 Ill., at p. 182):

"The second section of the charter mentioning *certain* PROPERTY to be *located* in or near the City of Chicago, and which is denominated 'the seminary,' we think the words in the fifth section, 'said seminary' refer to that *particular* PROPERTY."

The meaning of this language is clear and unmistakable—that the court construes the word "seminary," as used in section 2, and again in section 5, the exemption provision, as referring to *the school buildings*, which was the only "property" which could by any possibility be referred to as "the seminary."

The view adopted by the State Supreme Court in 174 Ill., that this was the particular meaning which the legislature intended the word should have in the exemption provision, was re-affirmed by the court in its two subsequent decisions in 189 Ill. (No. 140), and 193 Ill. (No. 265).

In our former argument, we have shown, as we believe conclusively, that giving to the word "seminary" in section 5 this meaning, involves giving to the entire provision a construction which would be so unreasonable and would, in fact, lead to such absurd results that it could never have been intended by the legislature. (Brief, pp. 69–73.) And that this view of the state court can not be sustained for other reasons, see our former brief, (pp. 47–97.)

That we were correct in this position is, in effect, conceded by counsel by their entire abandonment of the view, thus expressed and maintained by the State Supreme Court in its three different decisions, and their attempt to give to it another meaning, not only wholly different from, but in fact, inconsistent with, the meaning given it by the state court.

Their contention is that the words "said seminary" should be given neither the meaning contended for by plaintiff in error—the educational institution referred to in the title and in other provisions of the act, and which it was the declared object of the act to incorporate—nor that adopted by the State Supreme Court—the school buildings—but a third and wholly different meaning.

The precise meaning which counsel intend to give to the word is nowhere clearly defined by them, but that it is wholly different from that adopted by the State Supreme Court, "the particular *property*" referred to, as the court assumes, in section 2—the school buildings—is clear.

Counsel say:

"It (the exemption clause) will exempt all property owned by the corporation which is a part of or connected with *the school*, which the corporation has located and is *maintaining* in the City of Chicago." (p. 7.)

"The only reasonable construction is to confine the meaning of the word *seminary* to *the school established* in the City of Chicago." (p. 28.)

"The word *seminary* means *the school* or place of learning which the corporation has located and *is maintaining* in the City of Chicago." (p. 31.)

It thus appears, that "the school" referred to was something which had a continuous existence—something which was "*established*" in the first instance (p. 28), and afterwards "always *maintained*" (p. 25). It was also a "school" which had officers, professors and teachers (p. 26).

The entire reasoning of counsel on the question of construction is based on two erroneous assumptions. *First*, that, notwithstanding plaintiff in error is a charitable corporation and there is an express provision in its charter that "this act" be "construed liberally in all courts," the same rule of strict construction should be applied as if the exemption was in the charter of a railroad or other corporation for *private* profit which contained no such provision; and *second*, an erroneous assumption as to the effect of the rule of strict construction.

Proceeding on these erroneous assumptions, the theory of counsel seems to be that, under the rule of strict construction, it is only necessary to find *some* possible definition of the word "seminary" which will narrow its meaning to fit their construction, and that the meaning thus arrived at should be adopted, unless it results in an absurdity. (Brief, p. 29.)

But manifestly, the question is not as to the possible meaning which the word "seminary" *may have*, but as to the meaning the legislature intended the words "*said* seminary," in the particular provision, should have.

And the authorities cited in our original brief (pp. 87–89), show that, even when the rule of strict construction applies, the primary question still is, What was the *intention* of the legislature in using the language it did?

Nor does the rule of strict construction exclude the application of the other rules of construction in ascertaining this intention. (Brief, pp. 85–89.)

It is a fundamental rule that, in giving construction to a statute, it should be construed so as best to promote and effectuate the policy and object of the act.

In *U. S.* v. *Hartwell*, 6 Wall., 384, this court, SWAYNE, J., referring to the rule of strict construction, says (p. 395):

"The object in construing penal, as well as other statutes, is to ascertain the *legislative intent. That* constitutes the law. * * * It must not be defeated by a forced and overstrict construction. * * * The proper course in all cases is to adopt that sense of the words *which best harmonizes with the context and promotes in the fullest manner* THE POLICY AND OBJECTS OF THE LEGISLATURE."

And all the authorities agree that, notwithstanding the general rule of strict construction, an exemption provision in the charter of a charitable corporation should be construed, not narrowly, but in a fair and liberal sense, so as to promote the charitable objects for which the corporation was formed. (Brief for plaintiff in error, pp. 78–81, and authorities cited.)

In the particular charter before the court, the legislature itself declared the rule of construction which should be applied, in order to give full effect to the charitable and beneficial purpose of the act, by the express provision of section 6, that the act "*shall be construed liberally in all courts* for the purposes therein expressed." (See Brief, pp. 81–85.)

The policy and purpose of provisions of exemption in the charters of such charitable corporations are very clearly and forcibly expressed in two well-known cases decided by this court.

In *Home of the Friendless* v. *Rouse*, 8 Wall., 430, the court, in giving construction to an exemption provision in the charter of the Home of the Friendless, Mr. Justice DAVIS delivering the opinion, say:

"The purposes to be attained by such a charity are usually beyond the ability of individual effort, and require an association of persons who will themselves contribute pecuniary aid, and are willing to become solicitors for the contributions of others. Usually the initiation of such an enterprise

is in the hands of a few persons who need to be clothed with more than ordinary powers in order to obtain the successful co-operation of others. *In no way could this co-operation be better secured than by conferring on the corporators the authority to say to the benevolent people of St. Louis that their donations in money or lands, for the relief of the suffering female poor of the city, would be held by the institution undiminished by taxation.*"

In *Washington University* v. *Rouse*, 8 Wall., 439, argued and decided at the same time with the *Home of the Friendless* v. *Rouse*, *supra*, the court, Mr. Justice DAVIS delivering the opinion said (pp. 439-440):

"There are *no material points of difference* between the case just decided and this case, and the views presented in that case *are applicable to* this. The object of the charter in the one was to promote a charity, in the other *to encourage learning. Both were public objects of advantage to the country, and which every government is desirous of promoting.*"

The question, therefore, is: Reading this provision in the light of the manifest purpose of the act to promote by the grant of exemption from taxation the charitable object for which the institution of learning founded by the act was created, what was the legislative intention?

The plaintiff is purely a charitable corporation, and all its property, including the property on which the taxes in question were levied, represents donations presumably made on the faith of this provision of exemption from taxation.

Was it the intention of the legislature, in making this grant of exemption, that the donors to the institution should understand that all the property donated to promote its charitable object should be exempt from taxation, or that only the narrow and limited exemption of the seminary buildings and apparatus was intended?

The contention of counsel that the legislature intended to exempt only the property which was "part of or connected with" what they term the "school," as distinguished from the incorporated institution, cannot be sustained, for different reasons.

(1) As appears from the published reports of the cases (189 Ill., pp. 439 and 193 Ill., p. 619), the same counsel who appear for defendant in error also argued the case in the state court, and it is a fair inference that this third meaning which counsel now seeks to give to the word seminary is not presented by them for the first time in this court, but that it was also contended for by them in the State Supreme Court in the different cases decided by that court. We have, therefore, at the outset, the fact that the State Supreme Court, on consideration of the question in its three different decisions, rejected this meaning as not tenable, and therefore adopted as the basis of the construction contended for, the wholly different meaning—"the *particular property* referred to in section 2"—the school buildings.

(2) Counsel nowhere controvert the many authorities cited by us (Brief, pp. 76-77) which distinguish between an exemption from taxation in favor of corporations organized for private profit and charitable corporations such as plaintiff in error, and hold that such exemptions in favor of charitable corporations should be construed not narrowly but liberally, so as to promote the charitable object. On the contrary, all the statements of the rule of construction they claim should be applied, which are quoted by them, are taken from cases in which the rule was applied to corporations for private profit, railroad, insurance and banking corporations.

As to the express provision of section 6 of the charter of plaintiff in error, that it "shall be construed *liberally* in all courts," counsel do not controvert our construction of its meaning, and that it was the intention of the legislature that it should be applied in giving construction to the provision in question.

On the contrary, they in effect concede the correctness of our construction of the provision by apparently urging the manifestly untenable contention that this particular section *is not protected by the Federal Constitution,* etc., and that, therefore, this court, in giving a construction to the act, is bound by the construction the State Court gave to section 6, which we have shown would render it wholly meaningless. (Brief, p. 84.)

(3) Regarding the word "seminary" in the exemption provision—"*the* property, etc., *belonging* or appertaining to *said* seminary"—as used in the sense contended for by counsel, the "*school* of higher learning," as distinguished from the mere seminary buildings, the words "*said* seminary" in the exemption provision should be held to refer to the educational institution, "the school of higher learning," *incorporated by the act.*

The act was entitled "An Act *to incorporate* the Chicago Theological Seminary."

It was provided by section 2 that the object of the institution of learning which was incorporated by the act —the theological seminary—should be to furnish instruction and the means of education to young men preparing for the ministry. To promote this object this "seminary," which it was the declared purpose of the act "to incorporate," was given a corporate existence, and was endowed with the different corporate powers granted by the

charter—the power to hold and convey property, to have officers, to employ teachers, etc. All the property which it was authorized to acquire was to be held and used to promote the object declared in the charter. All the different powers with which, as a corporate body, it was endowed, were to be exercised in furtherance of this object. It had and could have no private purpose.

The words "the property," etc, "belonging or appertaining to said seminary," referred to some entity, and that an entity mentioned in the charter. In no proper and reasonable sense could "*the* property of every kind or description," be said to "*belong* or appertain to" the act of giving instruction—the function of teaching—a mere abstraction, which counsel term "the school."

The narrow meaning given to the word "seminary" by the State Supreme Court—the school buildings—being abandoned by counsel as not tenable, there is no entity mentioned in the act to which the words "*said* seminary" could refer, except the institution of learning—the Theological Seminary—which was given a corporate existence by the act, and the incorporation of which, with the powers and for the object provided, was the declared purpose of the charter.

The language and reasoning of the court in *County of Nobles* v. *Hamline University*, 46 Minn., 316, qnoted in our original brief, (p. 67) is peculiarly pertinent in this connection.

(4) The only definition which counsel attempt to give to the word seminary in the sense contended for, "the school," is the short definition quoted by them from Webster's Dictionary, "a place of education as *a school of high grade, an academy, college, or university.*"

It is submitted that there is nothing in this definition which excludes the idea of an incorporated institution. The general phrase "school of high grade" does not help to solve the question.

A reference, however, to the more specific definitions which are given of the words "university" and "college," given in the definition quoted by counsel as the synonyms of "seminary," make clear what is intended when the word seminary is used as it was in the exemption provision—"said seminary"—in reference to an incorporated institution.

In Webster's International Dictionary, from which the definition of "seminary" is quoted, the word "university" which is given as the synonym of seminary in the definition quoted by counsel, is thus defined:

"*An institution organized and incorporated* for the purpose of imparting instruction, examining students and otherwise promoting education in the higher branches of literature, science, art, etc., and empowered to confer degrees in the several arts and faculties, as in theology, law, medicine, music, etc."

Black's Law Dictionary, referring to the word "college" gives as its definition:

"In the most common use of the word it designates an institution of learning (*usually incorporated*), which offers instruction in the liberal arts and humanities and in scientific branches, but not in the technical arts or those studies preparatory to admission to the professions."

Rapalje & Lawrence's Law Dictionary gives as the definition of the same word "College":

"In American law, a college is *an institution of learning*, where youth are instructed in the higher branches. Colleges are *usually incorporated* and endowed, and enjoy certain privileges *granted them by charter*."

Under the title "Universities and Colleges," the American & English Encyc. of Law uses the following language (Vol. 27, p. 683):

"*Universities* and *colleges* may be founded wholly by the state, in which case they are *public corporations*, subject to control of the legislature; or they may be founded *by private donations*, aided or unaided pecuniarily by the government, when they are *private corporations* over which the legislature has no control save under the reservations in the charter or act of incorporation."

(5) It is not controverted by counsel that in construing a statute the words used are to be given their primary and ordinary meaning unless it appears from other provisions that a different meaning was intended.

Nor is it controverted that if the word "belong" in the exemption provision meant ownership, it is indisputable that the words "said seminary" referred to the incorporated institution.

In *Gammon* v. *Gammon*, 153 Ill., 41, cited in our original brief, the Supreme Court of Illinois expressly held that the primary and ordinary meaning of the word "belong" is that of ownership.

In the following cases cited in our original brief, the word "belong," occurring in a provision of exemption substantially the same as the provision in question, was held to mean ownership, and the corresponding words "seminary," "institution" and "asylum" were held to mean the institution incorporated by the act.

County of Nobles v. *Hamline University*, 46 Minn., 316.

Asylum v. *New Orleans*, 105 U. S., 362.

President & Faculty of St. Vincent's College v. *Schaeffer*, 104 Mo., 261.

See, also, to the same effect.

University v. *Skidmore*, 87 Tenn., 156.

Humphries v. *Little Sisters of the Poor*, 29 Oh. St., 201.

We have also shown in our original brief that in a number of other like charters, passed by the same legislature—one at the previous session and two at the same session—there were exemption provisions in the identical language, including the words "*belonging* or appertaining to," in which the word "belonging" was unmistakably used in the sense of *ownership*. (Brief, p. 95, Appendix, pp. 5–7.)

Where in the act do counsel find the evidence of the legislative intention to give to the word "belonging," in the provision "the *property*, etc., *belonging* or appertaining to said seminary," a different meaning as applied to property from its primary and ordinary meaning—that of *ownership*?

What language or provision of the act has been referred to as showing an intention that the word should be given a meaning so wholly different from this ordinary meaning, which it was held to have in substantially the same exemption provision in the five different cases cited, and which it clearly had in the charters referred to?

The only reason suggested by counsel is that the word *admits of* another meaning, and that because, as they assume, the words "said seminary" also admit of a different meaning from that of the incorporated institution, therefore "belonging to" means "part of, or connected with," and "said seminary" means "the school."

In fact the argument is the other way.

The primary and natural meaning of the word "belong"

being that of *ownership*, and there being nothing in the act showing that a contrary meaning was intended, this of itself shows that "*said* seminary" referred to the educational institution, which it was the express object of the act to incorporate and which was the only entity capable of owning property mentioned in the act.

(6) The constitution in force in Illinois at the date of the act, that of 1848, provided that "no private or local law which may be passed by the General Assembly, shall embrace more than one subject, *and that shall be expressed in the title.*" Under this provision the *title* was a part of the act.

Cohn v. *People*, 149 Ill., 492.

That where the title is thus made a part of the act, it may properly be referred to in ascertaining the intention of the legislature, is well settled. (Brief of plaintiff in error, p. 51.)

In our original brief, we referred to the title of the act in question, "An Act *to incorporate* the Chicago Theological Seminary," as containing the *first mention* of the seminary, to which the words "*said* seminary" in section 5 referred.

We contended that, reading the other provisions of the act in which the word "seminary" occurs, in connection with the clear expression of the *object* of the act in the title "*to incorporate* the Chicago Theological Seminary," the words "*said* seminary," in section 5, had unmistakable reference to the incorporated institution.

Counsel argue that the title of the act can never be resorted to to aid in ascertaining the legislative intention, unless the meaning of the act is doubtful, and that because of the rules of strict construction, which they apply, the fact that we refer to the title at all is fatal to our con-

struction, citing *Yazoo & M. Ry. Co.* v. *Thomas*, 132 U. S., 174, 188.

It will be seen that the effect of the argument is that the title to the act can never be resorted to as an aid in ascertaining the legislative intention where the rule of strict construction applies.

In addition to the fact that we deny that the rule of strict construction applies to the provision in question, as the purpose of all construction is to ascertain the legislative intention, and as the title of the act, when made a part of it as in this case, may be resorted to as an aid in ascertaining that intention, it is submitted that there is the same reason for resorting to the title of an act to which the rule of strict construction applies as to any other.

We concede that the title cannot be resorted to for the purpose of enlarging the provisions of the body of the act or for the purpose of changing the clear meaning of the language of those provisions.

It may, however, always be referred to as an aid in determining the intention of the legislature, and its language may have such relation to the particular provision, the intention of which is in question, as to be determinative.

That the title may be resorted to as an aid in arriving at the legislative intention in construing an act to which the rule of strict construction applies, as in any other case, is shown in the cases of *Coosaw Mining Co.* v. *South Carolina*, 144 U. S., 550, 562, and *Knowlton* v. *Moore*, 178 U. S., 41, 65, in both of which the court, in construing a penal statute, referred to the title as an aid in arriving at the intention of Congress.

In the case of *Yazoo & M. Ry. Co.* v. *Thomas*, 132 U. S., 174, the attempt of counsel was to enlarge the exemption provision by resorting to the language of the preamble.

The court only held that there was no ambiguity and that it would not look to the preamble to create one.

(7) Counsel do not controvert any of our statements as to the different legislative acts set out in the Appendix to our brief, and their consequent force, as illustrating the legislative intention in the provision in question.

Their sole contention is that the argument from these provisions "is offset" by the fact that, in the exemption provision in the charter of the Northwestern University, referred to in *University* v. *People*, 99 U. S., 309, the words "the corporation" were used. (Brief, p. 30.)

It should be noted, however, that this provision was in amendment to the original charter, and the same form of phrase used in so many other charters to express a *total* exemption as in the charter in question, the words "*said* seminary," "*said* institution," etc., were not for that reason appropriate.

The fact remains that it is indisputable, and not controverted by counsel, that in a number of different charters, two passed at the same session as the charter in question, exemption provisions *in the precise form* of the one in question were used in a connection *which left no room for any contention that anything but a total exemption was intended.* (Brief, pp. 94–96; Appendix, pp. 5–13.)

The fact also remains that the many provisions of the different charters quoted in the Appendix show that, when such *partial* exemption was provided as it is claimed was *intended* by the one in question, the legislature used and knew how to use the appropriate specific language. (Brief, pp. 91–93; Appendix, pp. 2–5.)

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